NO. 44342-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KERR CONTRACTORS, INC.; LIBERTY MUTUAL GROUP, INC.; a/k/a SAFECO INSURANCE COMPANY OF AMERICA, Bond Nos. 6709272, 6709273, 5581430,

Appellants (Defendants)

v.

DAN'S TRUCKING, INC.,

Respondent (Plaintiff)

RESPONDENT DAN TRUCKING INC.'S RESPONSE BRIEF

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A. INTRODUCTION

Respondent Dan's Trucking, Inc., was a trucking subcontractor for Kerr Contractors, Inc., on a public work. When Kerr failed to pay Dan's Trucking the amount due under its subcontract, Dan's Trucking asserted a public works bond and retainage claim and ultimately sued to receive payment. CP 5-15.

Dan's Trucking's claim was within the MAR jurisdictional limits. Therefore, the case was transferred to MAR for resolution, and Les Ching was assigned as the MAR arbitrator. CP 26-29. Prior to the arbitration, the parties settled the substantive issues in the lawsuit and struck the pending arbitration. CP 26-29. In that settlement, which was memorialized by email, the parties also agreed that Dan's Trucking's entitlement to attorney's fees would be resolved by arbitration and that Les Ching would be arbitrator.

The parties dispute whether this was a continuation of the MAR arbitration or was a new arbitration based on a separate contractual agreement to arbitrate the fee issue. The emails striking the MAR arbitration and providing for arbitration on fees are silent on this issue. However, the MAR arbitration was stricken and a new arbitration was set, based on the settlement agreement, in which the arbitrator decided (on a

paper review) the fee issue, which was not an issue that would have been heard or decided in the usual course of the MAR arbitration.

Les Ching then decided the fee issue. CP 21-22. Kerr Contractors, Inc., was dissatisfied with the result and sought a trial de novo under the MARs. CP 23-25. Dan's Trucking objected to this process as being inappropriate because the arbitration was held under authority granted by the settlement agreement not by the MARs. CP 26-29; 30-33. After hearing the arguments of both sides, the Trial Court agreed with Dan's Trucking's analysis and issued an Order Striking Request for Trial de Novo. CP 49-50. In fact, this issue was resolved in favor of Dan's Trucking in two separate hearings by two different judges. (see CP 34-36; 37-38.) (The first order was stricken because Kerr asserted that it had not received proper notice of the hearing because their attorney had moved without notifying either the court or opposing counsel. CP 39-44; 45-46.)

B. ISSUE PRESENTED FOR REVIEW

Was it erroneous for a Trial Court to rule that an agreement to arbitrate fees allowed under RCW 18.27, RCW 39.08 and RCW 60.28, after settlement of a claim within the jurisdictional limits, a contractual arbitration agreement under RCW 7.04A rather than an agreement to continue MAR arbitration under RCW 7.06?

C. ARGUMENT

1. Standard of Review

Errors of law are reviewed de novo. Sunnyside Valley Irrigation District v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). This includes issues of construction or interpretation of a statute or court rule. See, City of Spokane v. Spokane County, 158 Wn.2d 661, 673, 146 P.3d 893 (2006); W. Telepage, Inc. v. City of Tacoma Department of Finances, 140 Wn.2d 599, 607, 998 P.2d 884 (2004); In re Matter of Kistenmacher, 134 Wn.App. 72, 79 n.5, 138 P.3d 648 (2006). In addition, interpretation of a written contract is similarly an issue of law involving de novo review. See Tanner Electric Coop. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 674, 911 P.2d 1301 (1996).

However, the determination of prevailing party and resultant fee awards are matters of lower court discretion and are reviewed for abuse of discretion. "The amount of a fee award is discretionary, and will be overturned only for manifest abuse." Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 65, 738 P.2d 665 (1987) (citing Bowers v. Transamerica Title Ins. Co. , 100 Wn.2d 581, 595-96, 675 P.2d 193 (1983)). This court also reviews the reasonableness of attorney fees awards under an abuse of discretion standard. Progressive Animal Welfare Soc'y v. Univ. of Wash. , 114 Wn.2d 677, 688-89, 790 P.2d 604 (1990).

> A trial court does not abuse its discretion unless the exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." This court has overturned attorney fees awards when it has disapproved of the basis or method used by the trial court, or when the record fails to state a basis supporting the award.

Brand v. Dep't of Labor & Indus. , 139 Wn.2d 659, 665, 989 P.2d 1111 (1999) (citations omitted) (quoting Progressive , 114 Wn.2d at 688-89).

This is important here not because the fee award to Dan's Trucking as the prevailing party is an issue on appeal (it isn't), but because the determination that Dan's Trucking is already the prevailing party in this matter moots any possible benefit Kerr could have from this appeal. Dan's Trucking is the prevailing party. As such, Dan's Trucking is entitled to recover its attorney's fees. As those fees increase as Kerr seeks to contest the amount of the award, the ultimate amount that will be awarded against Kerr continues to grow and will soon dwarf the amount that has been awarded already. This is a useless appeal, and can and should be denied on that ground alone.

2. The Trial Court Did Not Err

This case arises from the interpretation of a very spare attorney's fee arbitration clause in a memorandum of settlement (drafted by Kerr's attorney) which resolved the substantive issues between the parties that had been set for hearing in a mandatory arbitration under the MAR process. Dan's Trucking contends that the settlement ended and replaced the MAR process and

substituted the settlement agreement, including the contractual arbitration clause it contained, for that process. Kerr contends that the settlement did not resolve the case or end the MAR process and that the attorney's fee arbitration that occurred by paper hearing under the settlement was a MAR arbitration. Kerr's position is not supported either by the procedural facts of this case or applicable MAR and private arbitration law in Washington State.

The pre- MAR settlement, in addition to resolving the base dispute between the parties, also stated that Dan's Trucking's fee claim would be resolved by arbitration. The settlement did not state that MAR arbitration will continue on the sole issue of fees or that the parties consented to MAR arbitration of those fees. On these facts, the Trial Court correctly concluded that the fee arbitration was not a continuation of the MAR arbitration but was rather a contractual arbitration agreed to in the settlement agreement.

"[A]rbitration in Washington is exclusively statutory." Godfrey v. Hartford Cas. Ins. Co., 142 Wn.2d 885, 893, 16 P.3d 617 (2001). There are two kinds: private arbitration (under RCW 7.04A) and MAR arbitration (under RCW 7.06). Further,

> strong public policy favoring finality of arbitration dictates that any ambiguity with respect to which statute the parties have invoked—chapter 7.04 or chapter 7.06 RCW—be resolved in favor of binding arbitration under chapter 7.04 RCW. This is especially so where the party seeking arbitration to invalidate an agreement for binding arbitration was the drafter of the agreement.

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Sales Creators, Inc. v. Little Loan Shoppe, LLC, 150 Wn. App. 527 at 532; 208 P.3d 1133 (2009), citing to Dahl v. Parquet & Colonial Hardwood Floor Co., 108 Wn. App. 403, 412, 30 P.3d 537 (2001); see also Kamaya Co. v. Am. Prop. Consultants, Ltd., 91 Wn. App. 703, 713-14, 959 P.2d 1140 (1998), review denied, 137 Wn.2d 1012 (1999).

Mandatory arbitrations are governed by rules published by the Supreme Court in addition to the terms of RCW 7.06. Underscoring the precedence of private, binding arbitration, MAR 1.1 states that "[t]hese [arbitration] rules do not apply to arbitration by private agreement ..., except by stipulation under rule 8.1." Here, we have a private contract (settlement agreement) with an arbitration clause but no stipulation (in the settlement agreement or otherwise that the attorney fee arbitration would be conducted under the MAR rules and process.

At best, the arbitration clause in the settlement agreement is silent as to whether the subsequent arbitration would be binding private arbitration or nonbinding MAR arbitration. Kerr attempts to avoid being bound by the result of the attorney's fee arbitration by exploiting this ambiguity and belatedly asserting that the parties (or at least Kerr) intended that the arbitration be a MAR arbitration. Dan's Trucking does not share, and never did share, this interpretation. Even if the fee arbitration term could be said to be ambiguous, that ambiguity was created by Kerr's attorney (who drafted the

settlement memorialization). Any such ambiguity is to be resolved against the drafter. Dwelley v. Chesterfield, 88 Wn.2d 331, 336, 560 P.2d 353 (1977); Hepler v. CBS, Inc., 39 Wn.App. 838, 845, 696 P.2d 596 (1984).

"While the parties are free to decide by contract whether to arbitrate, and which issues are submitted to arbitration, once an issue is submitted to arbitration, however, Washington's Act applies." Godfrey, 142 Wn.2d at 894. "Under the Act, there is no such thing as a trial de novo." Godfrey, 142 Wn.2d at 895; *see also* RCW 7.04A.220, RCW 7.04A.230, RCW 7.04A.240; and RCW 7.04A.250.

Had the parties actually arbitrated their dispute under the MARs and RCW 7.06, the award therefrom would have been subject to trial de novo. However, the parties resolved the dispute that was the basis for mandatory arbitration and then agreed to arbitrate a different dispute (about fees) that arose later than the dispute at issue in MAR. Further, the determination of fees was not already an issue in MAR. Fee requests are most often handled at time of entry of judgment by Superior Court rather than by the MAR arbitrator because not all fees have been incurred prior to the time for entry of judgment. "A compromise or settlement agreement is a contract...." Riley Pleas, Inc. v. State, 88 Wn.2d 933, 937, 568 P.2d 780, 783 (1977).

In settling the matter, which was slated to have been determined by an arbitrator pursuant to mandatory arbitration, the parties removed the matter

from mandatory arbitration. *See* Oregon Mut. Ins. Co. v. Barton, 109 Wn. App. 405, 414, 36 P.3d 1065 (2001) ("a general settlement agreement embraces all existing claims arising from the underlying incident" and a "strong presumption attaches that the parties have considered and settled every existing difference").

Here, the settlement agreement resolved all issues between the parties and provided for arbitration of an issue that would have otherwise been properly decided by the Trial Court – attorney's fees. There was no error by the Trial Court in interpreting the fee arbitration as a contractual arbitration under RCW 7.04A rather than a continuation of the mandatory arbitration under RCW 7.06. The Trial Court's determination that the attorney's fee arbitration was binding private arbitration, from which no appeal may be had, should be affirmed.

3. Dan's Trucking is Entitled to Attorney's Fees if it Prevails; Kerr is Not.

RCW 39.08.030 and RCW 60.28.030 both provide for fees to a claimant who prevails on a public works bond or retainage claim. These fee provisions are not "two-way streets." Successful claimants are entitled to recover their fees. Opponents of claimants, who successfully defeat a claim, are not. Therefore, under these statutes, Dan's Trucking is entitled to the fee

award it received below and will be entitled to recover fees on appeal if it prevails here. Kerr is not entitled to fees, even if it should prevail.

RCW 39.08.030 explicitly provides that a claimant who prevails on a claim against a public works payment bond has the right to reasonable attorney fees and costs incurred. RCW 39.08.030(1) ("[I]n any suit or action brought against such surety or sureties by any [claimant], the claimant shall be entitled to recover in addition to all other costs, attorney's fees in such sum as the court shall adjudge reasonable."); see also U.S. Filter Distribution Group, Inc. v. Katspan, Inc., 117 Wn. App. 744, 750, 72 P.3d 1103 (2003) ("This is not a discretionary provision; where the statute applies, the trial court is required to award fees."). The public works retainage statute also explicitly recognizes that a claimant who prevails in a lawsuit against the retainage fund is entitled to reasonable attorney fees and costs incurred. RCW 60.28.030 ("[I]n any action brought to enforce the lien, the claimant, if he prevails, is entitled to recover, in addition to all other costs, attorney fees in such sum as the court finds reasonable.").

A surety (or general contractor) cannot escape the obligation to pay fees and costs under RCW 39.08.030 (or RCW 60.28.030) merely by paying the principal amount due. *See* Katspan, 117 Wn. App. at 747, 756-57. Indeed, the Katspan court made clear that a surety that attempts to do so "is not excused from paying the fees [the plaintiff] has accrued since [payment of

the principal amount]." *Id.* at 747. Thus, where a surety on a RCW 39.08 claim tendered the full principal amount due but "only $125 for attorney fees, rather than an amount sufficient to cover [the plaintiff]'s reasonable attorney fees as required by RCW 39.08.030," the Court of Appeals held that the plaintiff was entitled to full reasonable attorney fees – including all fees incurred after payment of the principal amount – because the law "does not penalize [the plaintiff] for continuing the litigation in order to obtain the amount of attorney fees to which it was entitled by statute." *Id.* at 757 (emphasis added). Under Katspan, Kerr must pay all reasonable fees and costs incurred both before and after Kerr paid Dan's Trucking the amount owed.

In fact, based on this payment of the underlying claim through the settlement in this case, Dan's Trucking is and will remain the prevailing party. This will not change even if this case is remanded for a trial de novo on the issue the amount of Dan's Trucking's fee entitlement. Dan's Trucking is entitled to recover its fees, in a reasonable amount based on the total amount of the fees incurred and the "lodestar" for fee calculation. Ironically, that recovery will include all fees incurred in this appeal, even if the result is remand. In short, Dan's Trucking is entitled to recover its fees, and Kerr's appeal of the fee award below will necessarily result in additional and further fee awards to Dan's Trucking as the party that has already prevailed.

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D. CONCLUSION

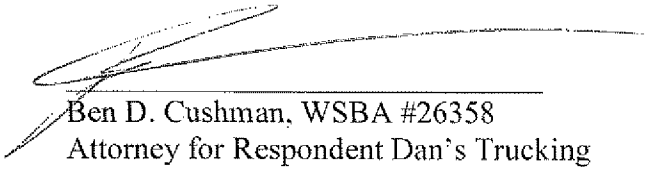
This case arises from an arbitration clause in a written settlement agreement (albeit a minimal and rather sketchy settlement memorialization). The issue is whether that arbitration clause provides for binding, contractual arbitration under RCW 7.04A or for a continuation of mandatory arbitration under RCW 7.06 and the MARs. Two Superior Court judges interpreted the agreement as providing for private, contractual arbitration. Kerr, as the dissatisfied, non-prevailing party, appealed.

The Superior Court decisions are consistent with settled Washington law. Arbitration clauses in contracts, including settlement agreements, are presumptively governed by RCW 7.04A rather than RCW 7.06 and the MARs. To overcome this presumption, MAR 1.1 and 8.1 provide a process whereby the parties can stipulate to MAR arbitration rather than RCW 7.04A arbitration. Caselaw establishes that, absent such a stipulation, RCW 7.04A applies. There is no such stipulation here, either in the settlement agreement or entered into thereafter. Further, Dan's Trucking, would not have so stipulated even if asked to do so.

The decisions below were proper and should be affirmed. Additionally, Dan's Trucking should be awarded additional attorney's fees as the prevailing party under RCW 39.08.030 and RCW 60.28.030.

SUBMITTED this 28th day of August, 2013.

CUSHMAN LAW OFFICES, P.S.



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CERTIFICATE OF SERVICE

I declare under penalty of perjury according to the laws of the State of Washington, that on the date signed below, I caused the foregoing document to be filed with this Court, and emailed and mailed to opposing counsel as indicated below:

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